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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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EDWARD THOMAS WILSON,

Petitioner,

v.

TIMOTHY FILSON, *et al.*,

Respondents.

Case No. 2:98-cv-01174-GMN-BNW

ORDER

Before the court are petitioner Wilson’s motion for an evidentiary hearing (ECF No. 196) and motion for limited discovery (ECF Nos. 197/199). With the former, he argues that he is entitled to an evidentiary hearing to establish cause and prejudice, under *Martinez v. Ryan*, 566 U.S. 1 (2012), to excuse any procedural defaults and to show that he received ineffective assistance of counsel (IAC) in the guilt and penalty phase of his trial. With the latter, he asks permission to depose witnesses who may not be able to appear in person at an evidentiary hearing. For reasons that follow, the motions will be denied without prejudice.

In *Martinez*, the Supreme Court noted that it previously held, in *Coleman v. Thompson*, 501 U.S. 722, 746-47 (1991), that “an attorney’s negligence in a postconviction proceeding does not establish cause” to excuse procedural default. *Martinez*, 566 U.S. at 15. The Court in *Martinez* “qualif[ied] *Coleman* by recognizing a narrow exception: inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.” *Id.* at 9. The Court described “initial-review collateral proceedings” as “collateral proceedings which provide the first occasion to raise a

1 claim of ineffective assistance at trial.” *Id.* at 8. It took care to point out that its “holding ... does
2 not concern attorney errors in other kinds of proceedings, including appeals from initial-review
3 collateral proceedings, second or successive collateral proceedings, and petitions for
4 discretionary review in a State's appellate courts.” *Id.* at 16. Also, *Martinez* cannot serve to
5 excuse the default of any claim that is not an ineffective assistance of trial counsel claim. *See*
6 *Davila v. Davis*, 137 S. Ct. 2058, 2070 (2017) (expressly declining to extend the *Martinez*
7 exception to allow federal courts to consider ineffective assistance of appellate counsel claims).

8 Wilson argues that, because he has presented colorable claims of ineffective assistance of
9 trial counsel and post-conviction review (PCR) counsel, *Martinez* allows him to add evidence to
10 his IAC claims without the usual evidentiary limitations imposed by 28 U.S.C. § 2254(d)(1) and
11 28 U.S.C. § 2254(e)(2). ECF No. 195, p. 60; ECF No. 196, p. 4. Be that as it may, *Martinez*
12 applies only in the context of a petitioner seeking to excuse a procedural default. At this point,
13 this court has not determined that any of Wilson’s ineffective assistance of trial counsel claims
14 are procedurally defaulted.

15 Citing to *Dickens v. Ryan*, 740 F.3d 1302, 1320 (9th Cir. 2014) (en banc), Wilson argues
16 in his traverse that *Martinez* “applies to claims, like those in Wilson’s May 2015 Federal
17 Petition, that are ‘new’ because federal habeas counsel ‘substantially improved’ upon a version
18 of the claim presented to the state court.” ECF No. 195, p. 47. The relevant holding in *Dickens*
19 applies, however, only if “new factual allegations either ‘fundamentally alter the legal claim
20 already considered by the state courts,’ or ‘place the case in a significantly different and stronger
21 evidentiary posture than it was when the state courts considered it.’” *Dickens*, 740 F.3d at 1318
22 (quoting exhaustion case law). In that case, the claim is unexhausted and, because it can no
23 longer be raised in state court, procedurally defaulted as well. *Williams v. Filson*, 908 F.3d 546,
24 572-73 (9th Cir. 2018).

25 In moving for an evidentiary hearing, Wilson fails to specify which particular IAC claims
26 he is claiming are “new” claims for the purposes of *Martinez/Dickens*. And, because claims
27 presented in Wilson’s second state PCR proceeding were exhausted and are not procedurally
28 defaulted in this court, claims presented in that proceeding must be considered, as well as those

1 in his initial state PCR proceeding, in determining whether his third amended federal petition
2 presents a “new” IAC claim implicating *Martinez*. See *Williams*, 908 F.3d at 573-74.

3 In addition, Wilson’s conviction became final in 1985 and he has sought post-conviction
4 relief in state court with four separate proceedings. This court questions whether the holding in
5 *Martinez* would extend to claims that Wilson did not raise until his 2015 federal petition or, for
6 that matter, even until his defaulted third and fourth state petitions in 2005 and 2008. Put
7 another way, the court is not convinced that ineffective assistance of counsel in Wilson’s initial
8 PCR proceeding can still serve as “cause” for any default of Wilson’s “new” trial IAC claims
9 given the length of time that has elapsed and Wilson’s prior opportunities to raise those claims.

10 In light of the foregoing, Wilson’s motion for an evidentiary hearing and related motion
11 for limited discovery are denied without prejudice to Wilson renewing the motions with a more
12 particularized showing that *Martinez* applies to distinct trial IAC claims in his third amended
13 federal petition and that he is entitled to an evidentiary hearing in relation to those claims.

14 **IT IS THEREFORE ORDERED** that petitioner’s motion for an evidentiary hearing
15 (ECF No. 196) and motion for limited discovery (ECF Nos. 197/199) are DENIED without
16 prejudice.

17 **IT IS FURTHER ORDERED** that pending motions for extensions of time (ECF Nos.
18 213/217) are GRANTED *nunc pro tunc* as of their respective filing dates.

19 DATED: September 29, 2019

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22 UNITED STATES DISTRICT JUDGE
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